No. 580

In the Supreme Court of the United States

OCTOBER TERM, 1942

BERTHA A. OWENS, Executrix of the Estate of Leyle F. Owens, Deceased,

Petitioner,

vs.

UNION PACIFIC RAILROAD COMPANY, a corporation,

Respondent.

REPLY BRIEF OF PETITIONER

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

TABLE OF CASES CITED

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Petitioner is relying upon her brief filed in support of petition for writ of certiorari which states the points she intends to raise and the authorities to be relied upon in the hearing of this cause. The purposes therefore of this brief will be to reply to the points raised by respondent in its brief which will be replied to in their order.

ASSUMPTION OF RISK

ARGUMENT

I.

Replying to respondent's contention that the Circuit Court of Appeals correctly held as a matter of law decedent assumed the risk:

Respondent to bear out its position that decedent assumed the risk as a matter of law to sustain the decision of the Circuit Court relies solely upon what it claims is testimony that is uniform and uncontradicted that it was the universal custom and practice not to ring the engine bell in ordinary *switching operations* and *switchyard movements,* except when crossing the street or when necessary to warn section men or someone actually seen or known to be on the track, and refers to testimony of the following witnesses in support thereof, to which petitioner also directs the Court's attention.

Witness Koefod's testimony with reference to ringing the engine bell all related to *switching movements* (R. 80-81).

Superintendent P. T. McCarthy limits his testimony to so far as he knew by stating he never noticed the bell rung in ordinary *switching movements* (R. 187). He was never a switchman (R. 182) nor did he testify that knowledge of any kind was brought home to decedent of the failure to ring the bell.

Yardmaster D. B. Pidcock after testifying the bell was not rung in ordinary *switching movements* stated he believed Mr. Owens followed the practice of switching without the bell being rung. He did not state that he knew Mr. Owens followed such practice nor had he seen him do so (R. 197). He further testified that the ringing of the bell was up to the enginemen and that the engineer and fireman were supposed to obey the rules of the Company—that they were bound by them (R. 199-200).

A. Rutherglen, safety agent. On any testimony he gave he did not in any way bring knowledge home to Mr. Owens regarding the ringing of the bell, nor did his testimony show that he was employed by respondent when the accident occurred, nor did he ever work in the Spokane yards. (R. 203-206)

C. N. Richards, engineer, testified he did not ring the bell in *battlefield operations* (which means *switching movements*) except over road and street crossings and when someone was seen or known to be on the track, etc. (R. 207)

F. H. Lang's testimony clearly shows he hadn't worked with Mr. Owens for over ten years and did not pay any attention to his crew (R. 210-211).

It will be noted that all of the foregoing testimony with reference to ringing the engine bell relates to (1) *switching movements,* and (2) *"switching operations"* which literally means actual movement of the engine and cars.

At the expense of repetition which we have heretofore referred to in former brief, petitioner again states that Rule 30 relied upon provides that "*Engine bell must be rung when the engine is about to move*". Negligence charged by petitioner was failure "*to ring the bell of the engine as provided by the aforesaid rule, before moving said engine and cars or when same were about to move*".

We do not find any testimony whatsoever in the record that it was the custom or practice not to ring the engine bell when the engine was *about to move or immediately preceding its movement*, which was all that the rule required and it was on respondent's enginmen's negligent failure to ring the bell when the *engine was about to move or immediately preceding its movement* that the jury found its verdict in favor of petitioner.

The foregoing testimony relied upon by respondent could not set in operation the doctrine of assumption of risk against decedent as petitioner made no claim that respondent's enginemen were guilty of negligence because they failed to ring the engine bell during the actual switching movement. The distinction between ringing the engine bell when the engine is about to move and ringing the engine bell during the switching movement is clearly defined in the following authorities wherein the same rule reading "engine bell must be rung when the engine is about to move" is construed:

Giltner vs. Baltimore & O. R. Co. (2nd Cir.), 90 Fed. (2d) 635 (Cited p. 29 Petition for certiorari and brief).

Montgomery vs. Baltimore & O. R. Co. (6th Cir.), 22 Fed. (2d) 359 (Cited p. 29 Petition for Certiorari and Brief).

Respondent cites the cases of Toledo, St. L. & W. R. Co. vs. Allen, 275 U.S. 165, 72 L. Ed. 513, and Chesapeake & O. R. Co. vs. Nixon, 271 U.S. 218, 70 L. Ed. 914, to support its position and that of the Circuit Court in its decision. The case of Toledo, etc. vs. Allen has been heretofore analyzed and distinguished by petitioner from the case at bar and as well as the decision of the Circuit Court of Appeals and it is no doubt that such case led the Circuit Court of Appeals into error (see Petition for Writ and Brief in support thereof pp. 21-23).

Before passing to the second case cited by respondent we wish to call the Court's attention to the following:

"Under the law it is presumed that decedent proceeded with diligence and due care."

Atchison, T. & S. F. R. Co. vs. Toops, 281 U.S. 351, 74 L. Ed. 896.

Looney vs. Metropolitan R. Co., 200 U.S. 480, 50 L. Ed. 564.

In Chesapeake & O. R. Co. vs. Nixon there was no violation of a specific rule involved. The court in effect held that there was no duty owing to Nixon to

keep a lookout for him and that he assumed the risk because he understood as he instructed his men, that he must rely upon his own watchfulness and keep out of the way. This, and numerous other authorities, where no bell ringing rule is involved, hold that the railway owes no duty whatsoever to track men to warn them of the approach of the train, that such class of men have to look out for themselves and that they assume the risk of being injured unless some extraordinary condition exists. We do not find any authorities that apply this rule of law to switching crews where a ecific safety rule applies.

In the case of Gildner vs. Baltimore & O. R. Co. where a similar rule was involved with reference to ringing the bell, the court distinguished the case of Toledo v. Allen. We quote from opinion:

> "The first clause of the rule required the bell only at the start * * *. The convenient and safe way is to ring the bell whenever the engine moves and the rule ought to be so understood."

In passing on the question of assumption of risk the court stated:

> "We see nothing in the assertion that plaintiff assumed the risk of being struck from behind by walking where he did. Nobody has ever been able to say just where assumption of risk ended and contributory negligence began; but if the rule meant what we have said, there could be no assumption of risk unless the bell was rung."

In Montgomery vs. Baltimore & O. R. Co. where a rule similar to Rule 30 was involved, in passing on the question of assumption of risk the court held

> "If the starting of the engine without the bell was not negligent there was no case. If it was we cannot say that plaintiff assumed the risk."

In Lehigh Valley R. Co. vs. Mangan, 278 Fed. 85, where a similar rule was involved, the court held that the violation of such rule was negligence and that the conductor did not assume the risk.

It will be noted in the foregoing authorities that a clear distinction is made between the cases cited by respondent and the facts in the case at bar. If there is any evidence whatsoever of assumption of risk in the case, they were wholly questions of fact for the jury.

Rocco vs. Lehigh Valley R. Co., 288 U.S. 275, 77 L. Ed. 743. In this cause it was held (quoting from syllabus):

> "Risks assumed by a track inspector as ordinarily incident to his employment do not include a failure on the part of a motorman operating a train to keep a lookout and to give warning in places where the view of one who might be expected to be on the track or approaching from the opposite direction was shut off. The issues of negligence on the part of a motorman operating a train which collided with an inspector's tricycle approaching from the opposite direction at a curve where the view of the track ahead was obstructed, and of contributory negligence on the part of the inspector are for the jury where storm conditions made

the presence of the inspector likely and the inspector had failed to ascertain the whereabouts of the train as required by a rule of the employer, before starting on his trip."

Respondent makes the further contention that the evidence is uniform and undisputed that the engine bell was not rung during switching movements. Petitioner does not believe from the record of testimony that such is the case.

Witness Hinkle, a yardman and co-worker of decedent, gave the following testimony:

"Q. But in stopping and starting the cars you go by the signals in the Book of Rules is that right? A. Yes sir." (R. 114)

The undisputed evidence shows that Rule 30 is contained in the Book of Rules (R. 137-141) and it is admitted in the evidence and by the witness that all switching operations are done by and with the use of the switch engine (R. 3-17), the mechanical operation of which is in the sole charge of the enginemen (R. 199).

We further find that the testimony given by yardmaster Pidcock is to the effect that the ringing of the bell was up to the enginemen and that the engineer and fireman were supposed to obey the rules and that they were bound by them (R. 199-200).

Switchman Koefod also testified that the Book of Rules regulates the signals they give (R. 79, 81).

Petitioner's position is that the foregoing testimony and the inferences to be drawn therefrom constitutes a definite dispute with the testimony relied upon by respondent.

Like testimony was given in the case of Chesapeake & O. R. Co. vs. Proffitt, 241 U.S. 462, 465, 60 L. Ed. 1102, 1105 wherein the question of the custom when running in a cut of cars, to have a man on the front end with a light was in controversy. An experienced witness was called by the defendant and in answer to a question regarding whether the above stated custom existed he replied "Well, on the yard in switching cars they come right down to the book rule. It says where cars are being shoved a man must be placed on the head car". Many other witnesses testified that the above custom did not exist and the testimony relative to the book rule was the only testimony that created the dispute on the custom, and the Court there held that such evidence was considered sufficient to create a dispute in the testimony on the question involved.

See Kanawha & Michigan Ry. Co. vs. Kerse, etc., 239 U.S. 576, 60 L. Ed. 449, 450, wherein this Court considered evidence much more remote than in the case at bar as disputing almost conclusive evidence that decedent brakeman assumed the risk as a matter of law, and held that assumption of risk was a jury question and affirmed judgment recovered for brakeman's death.

See Tiller vs. Atlantic Coast Line R. Co., 87 L. Ed. 446 (decided February 1, 1943) for a learned discussion of the history of the doctrine of assumed risk.

The trial court did not err in referring the question of assumption of risk, if applicable at all, to the jury as under the facts and inferences to be drawn therefrom reasonable minds would differ in their conclusions.

Replying to Point II (page 13) raised by Respondent in its Brief:

II.

A. There was substantial evidence of Respondent's negligence to present the issue to the jury.

ARGUMENT

Of the five separate grounds of negligence alleged the trial court withdrew four from the jury, but notwithstanding this we believe there was substantial evidence of practice and custom that Koefod should have received a hand or other signal (R. 96-97) from decedent to have also submitted the cause to the jury on sub-division (c) which charged negligence in respect to failure to obtain such signal.

On the sole charge of negligence upon which the cause was submitted to the jury the undisputed evidence shows the existence of Respondent's Rule 30 which provides:

> "Engine bell must be rung when an engine is about to move and when approaching and passing public crossings at grade, stations, tunnels and snow-sheds"

the charge of negligence being that defendant's enginemen negligently failed to ring the bell of the engine as provided by the aforesaid rule, before moving the engine and cars or when the same were about to move.

Every witness who testified on the subject stated the engine bell was not rung during or preceding the kicking movement which resulted in decedent being struck by the cars thereby causing his injury and death. This is so stated and conceded by appellant in its brief (p. 5). Under this state of facts negligence is clearly shown as *a railroad company rule furnishes competent evidence against itself of a proper standard of care and its violation constitutes actionable negligence.*

Gildner vs. Baltimore & O. R. Co. (2nd Cir. 1937), 90 Fed. (2d) 635. This was an action under the Federal Employers' Liability Act by a conductor of a train to recover for injuries suffered in a switching yard. The train of which he was in charge came into the yard and stopped upon a passing track just north of the main track. He walked south across the main track to check some cars on another track that were going to be taken into his train. After checking the cars and going east to the station office he walked back westward to reach his train. In the meantime

some switching had been done whereby four cars had been left on the main track by his own crew, when it was required to pick up.

> "The time had come to clear the main track of the four cars left upon it, so that a passenger train might pass. The engine with some cars were backed on to the main track, coupled on to the four cars, and the string of twelve to fourteen in all moved east along the main track until it cleared the 'passing siding' switch, where it stopped, but only long enough to reverse and back into the 'passing siding track'. As it came along that track, the first car of the string struck the plaintiff, who was about ninety feet from the switch, threw him down, and ran over his arm. * * * The fault with which he charged the defendant was in failing to ring the bell at the time the engine, after stopping its eastward movement, began to back the string on to the 'passing siding track'. He relied upon a rule of the road that 'the bell will be rung when an engine is about to move; when moving through tunnels; along the streets of towns and cities; approaching and passing public road crossings at grade, stations and trains on adjacent track'. Whether the bell was rung was in dispute, but the verdict is conclusive that it was not.
>
> "(1) The indiscriminate ringing of bells in a switching yard has been disapproved by the Supreme Court, as tending rather to confuse than to warn (Aerkfetz v. Humphreys, 145 U.S. 418, 420, 12 S. Ct. 835, 36 L. Ed. 758; Toledo, St. L. & W. R. R. Co. v. Allen, 276 U.S. 165, 171, 48 S. Ct. 215, 217, 72 L. Ed. 513); but the first clause of the rule required the bell only at the start. On the other hand it is true that anyone who saw the string moving east and stopping just beyond the 'passing siding switch', would have known that it would back out of the main track; the plaintiff admitted

that he knew this, though he would not acknowledge that he could tell which track it might choose. But whether the pause would be only long enough to reverse, or whether something might delay the return for a few moments, no one could say; if the rule were construed to cover any stop whatever, that uncertainty would be met and it would not be necessary to speculate as to when the engine was 'about to move.' * * * The convenient and safe way is to ring the bell whenever the engine moves, and the rule ought to be so understood.

"(2-4) The defendant's other points are less serious. Rule Four required all employees to keep off all tracks except in the discharge of duty, and when stepping out of the way of approaching trains * * * go far enough to clear all running tracks. Before stepping upon or crossing a track they should look in both directions." The argument is that when the plaintiff crossed the main track from south to north he did not look to his right—east; and that if he had, he would have seen the string already moving west to gain the 'passing siding track'. Twice he said that the string was stopped at that time; and there is no reason to suppose the contrary. Moreover, that aside, this rule was no more than a general cautionary regulation; quite different from those whose violation is a bar as distinct from contributory negligence. It is only when the rule prescribes specific conduct that disobedience has so grave a consequence; all the cases in the Supreme Cou· have been of that kind; we think that the same is true of the lower courts. Indeed to hold that by enacting general admonitions of care as rules, a road can make all carelessness a bar, would repeal section 53 of title 45, U. S. Code (45 U.S.C.A. Sec. 53). We see nothing in the assertion that the plaintiff assumed the risk of being struck from behind by walking where he did. Nobody has ever been able to say just where assumption of risk ended and contributory

negligence began; but if the rule meant what we have said, there could be no assumption of risk, unless the bell was rung. It did not damage the defendant to leave the meaning of the rule to the jury, for the judge should have construed it in the plaintiff's favor anyway. The strictures upon the charge need no discussion." Judgment affirmed for plaintiff'."

Pacheco vs. New York, N. H. & H. R. Co. (2d Cir.), 15 Fed. (2d) 467 was an action under the Federal Employers' Liability Act by a section hand injured when struck by three cars being backed on switch track in freight yards without a warning as required by the Company's rule, which was charged as negligence.

"There was no one on the rear of the cars to warn employees at work on the tracks, nor did the switching engine ring its bell, either when starting or before crossing the highway. The defendant had promulgated a *rule that all engines must ring their bells when about to move, also that they must ring on approaching every public road.*"

The complaint was dismissed at the close of all evidence on the ground that plaintiff had assumed the risk of such accident.

The defendant contended that under the Massashusetts decisions the rule was for the protection of the train only and not the trackmen and that its violation was no evidence of defendant's negligence. The Court in its opinion stated:

"In none of these cases, so far as appears was there involved a rule which prescribed a specific cautionary signal designed for the protection of the men" * * *.

"(2) As to the measure of the defendant's negligence, we cannot see any peculiarity in the Massachusetts law. At least it has never been there suggested that a train crew would not be negligent which ran down a trackman in broad daylight, on a clear day and a straight track, by backing down upon him a shift of cars slowly moving along a siding. The doctrine, if it be applicable at all, affects only the question of whether the trackman assumes the risk of the violation of a rule which prescribed a cautionary signal in such a situation * * *.

"(3) Finally, the defendant argues that it is not shown that the plaintiff knew of the rule or acted in reliance upon it. Assuming that to be a relevant fact, which we do not decide, it was matter of defense, which must be proved.

Judgment reversed, and new trial ordered."

In *Montgomery vs. Baltimore & O. R. Co.,* 22 Fed. (2d) 359 Montgomery, a fireman, was injured by starting of engine causing doors on engine to swing together catching his arm and injuring it. Negligence charged was failure to warn. The trial court directed a verdict for the defendant which the appellate court reversed holding: (quoting from opinion)

"(1) We think there was substantial basis from which the jury might infer that the starting of the engine without any warning was an act of negligence as against plaintiff. Rule 30 of the operating department is as follows: 'The bell will be rung when an engine is about to move; while moving through tunnels; on the streets of towns and cities; approaching and passing public road crossings at grade, stations and trains on adjacent tracks.'

"(2) We think the natural interpretation of this rule is that it was intended as well for the protection of employees on and about the engine as for the protection of persons upon the track. We find nothing in the accompanying rules, or otherwise in the context, to indicate any other construction. It is obvious that a starting of the engine without warning might find a fireman or a brakeman upon the engine or tender in a position where merely an ordinary and careful starting movement might cause him to fall or be otherwise hurt, and it would require clear proof of established custom to justify treating this rule as not intended for the benefit of employees on the engine or tender. Such a safety rule is, as against the defendant, substantial evidence that reasonable care requires the precaution which the rule directs; '* * * its own rules furnishing competent evidence, as against itself, of a proper standard of care.' Taft, Circuit Judge in B. & O. Ry. v. Camp (C.C.A. 6) 65 F. 952, 960. See Baldwin on personal injuries, Sec. 358, p. 428.

"(3) If the starting of the engine without the bell was not negligent, there was no case. If it was, we cannot say that plaintiff assumed the risk."

Atchison, T. & S. F. Ry. Co. v. Ballard, 108 Fed. (2d) 768 (5th Cir. 1940). *Certiorari denied* 84 L. Ed. 1413, 310 U.S. 646. This was an action under the Federal Employers' Liability Act by an engineer for injuries sustained when his train collided with a standing train. Negligence charged was that the fireman of the engineer's train failed to keep a proper lookout. The plaintiff himself was charged with negligence in violating defendant's specific rules, Rule 93 which provided in effect all except first class trains will move

within yard limits at restricted speed, the train he was operating being other than a first class train. By Rule D-153 restricted speed was defined as "Proceed, prepared to stop short of train, obstruction or anything that may require the speed of a train to be reduced". There was a judgment for the engineer and the Railroad Company appealed. The judge throughout his charge failed to instruct the jury, as he should have done, that the violation by plaintiff of specific rules such as Rules 93 and D-153 would of itself constitute negligence, and further the charge did not properly advise the jury as to the weight to be attached to the rules, that is, as to their force and effect. (Quoting from the opinion):

> "(2-5) We think appellant is right. It is true, that a violation of company rules for the conduct of its employees, general in terms, will not ordinarily constitute negligence as matter of law. Nor will observance of such rules, as matter of law, necessarily be due care, but it will be for the jury to say, considering the rules along with the evidence as a whole, whether there was negligence. Gildner v. B. & O. R. Co., 2d Cir., 90 F. (2d) 635; Rocco v. Lehigh Valley R. R. Co., 288 U.S. 275, 53 S. Ct. 343, 77 L. Ed. 743; Miller v. Central R. Co. of New Jersey, 2d Cir., 58 F. (2d) 635; Hall v. Chicago B. & N. R. R., 46 Minn. 439, 49 N.W. 239. *A violation of specific rules though, will constitute negligence just as their observance by others, will, in relation to the violator, constitute due care,* Miller v. Central R. Co. of New Jersey, and other cases, supra. Thus, as applied to the question at issue, if the rule for keeping the train at restricted speed had stopped there, without more, it would have left the matter greatly one of judgment and

it would be a question of fact under the opinion of witnesses qualified to give opinions, whether in the particular case, there was negligence in failing to observe it. But where as here, there is a precise definition of restricted speed, the question of what the rule means and requires, is a *question of law for the court*, and the evidence of plaintiff himself showing that the train was not proceding at restricted speed within the definition, it was the duty of the court to say so, and to instruct the jury; that plaintiff was himself negligent in violating the rule of restricted speed; and that if the jury believed that that violation was the sole proximate cause of the injury, they should find a verdict for defendant." * * *

Reversed and remanded.

Lehigh Valley R. Co. vs. Mangan, 278 Fed. 85. This was a cause under the Federal Employers' Liability Act by a freight conductor who was working on an adjoining track along side of an engine of his train which was just starting, to see whether a defect had been removed. He was struck and injured by another train on an adjacent track. The Railway Company rule directed that the engine bell must be rung * * * while passing trains on adjacent tracks. The Court held that violation of such rule by the crew of the train which struck him was negligence and that the conductor did not assume the risk of such negligence.

Respondent relies on the cases of Aerkfetz vs. Humphreys, 145 U.S. 418, 36 L. Ed. 758, and Toledo St. L. & W. R. Co. vs. Allen, 275 U.S. 165, 72 L. Ed. 513, to sustain its position that failure to ring a bell as a

warning in switching operations is not a common law ground of negligence. Under the facts in the Aerkfetz case the Court held the ringing of bells on switch engines moving forwards and backwards would have tended to confuse.

In the Toledo case the plaintiff who was a car checker, predicated negligence on a failure to maintain adequate space between tracks in yards and failure of switch engine to ring a bell or blow a whistle to give warning of approach of a car to plaintiff. The undisputed evidence showed that the space between the tracks was sufficient to enable plaintiff to keep out of the way of moving cars although the danger would have been less if the space were greater and that the cars which injured plaintiff were detached from the engine, and that plaintiff was 300 or 400 feet away from the lead track and the engine was from 20 to 25 car lengths farther (altogether a distance of 1300 feet) and by reason thereof the ringing of a bell or sounding of a whistle would have been of no use to plaintiff as a warning. Citing Aerkfetz case. The Court further held that spacing of tracks was an engineering question and should not be left to the jury and for the reasons above stated judgment for plaintiff was reversed.

It will be noted that neither of these cases involved any rule adopted by the railroad for the ringing of a bell or giving any warning when the engine was about to move. There is a clear distinction in the facts of these cases and the case at bar. In the instant case

Rule 30 exists which provides that the bell shall be rung when the engine is about to move. The engine according to the testimony was about 100 feet away (R. 55-56) from where decedent was at the switch and he was in a position where he could have heard the bell had it been rung and it would have served as a warning to him.

Gildner vs. Baltimore & Ohio, *supra* from which has been quoted at length, is similar to the facts of this case with a like rule requiring the ringing of the bell when the engine is about to move, and it is there pointed out that the indiscriminate ringing of bells in a switch yard has been disapproved in the Aerkfetz and Allen cases:

> "But the first clause of the rule required the bell only at the start. On the other hand it is true that anyone who saw the string move east and stopping just beyond the passing siding switch would have known that it would back out of the main track; the plaintiff admitted that he knew this though he would not acknowledge that he could tell which track it might choose. But whether the pause would be long enough to reverse, or whether something might delay the return for a few moments, no one could say; if the rule were construed to cover any stop whatever, that uncertainty would be met and it would not be necessary to speculate as to when the engine was 'about to move'. * * * *The convenient and safe way is to ring the bell whenever the engine moves, and the rule ought to be so understood.* * * * It did not damage the defendant to leave the meaning of the rule to the jury for the judge should have construed it in the plaintiff's favor anyway."

This construction of the rule applies with equal force and effect to our case here. The rule is unambiguous and means just what it says. The learned trial judge upon whom devolved the duty of construing the rule (see Pascheo, Montgomery and Atchison cases, supra) thought so when he stated:

> "I feel there is evidence here of negligence on the part of the defendant because of the failure of its employees to comply with the rule which the defendant company had adopted. Clearly there is a causal connection—if Mr. Owens was relying—if we presume he was taking care for his own protection and was relying on that rule, and he had a right to rely upon thinking the bell would be rung when the engine was about to move, and the engine was close enough to him so if the bell had been rung he would have heard it, then there certainly is a causal connection between his accident and the failure to ring the bell" (R. 172).

The cases hereinbefore cited sustain petitioner's position that the violation of Rule 30 which was a specific rule for the conduct of respondent's enginemen, constitutes actionable negligence and that under the facts of the case as found by the jury under appropriate instructions by the Court, was the proximate cause of decedent's injury and resultant death.

B. The next contention made by Respondent is that Rule 30 was not intended for the benefit of decedent although the rule obviously was for the protection of the public, and employees other than members of the

switching crew who might not be apprised of the movement or approach of the switch engine (Resp. Brief 18-23) and cites as authority for its position Thompson vs. Downey, 78 Fed. (2d) 487, and Central Vt. Ry. Inc. vs. Sullivan, 86 Fed. (2d) 171.

The Thompson case was an action for the death of a section foreman who was killed while operating a hand car, by a train which overtook him. The section foreman had been with the company for 20 years and was experienced. On the morning in question the foreman failed to get a line-up of the trains which he was required to meet. The evidence showed that the train gave the usual crossing signal as it approached the crossing which it passed just prior to colliding with the section foreman. Quoting from the opinion:

> "In the instant case all warning signals were given. There was no unusual or extraordinary condition present respecting the track, the curve or the weather. The record does not disclose that decedent had a scheduled time for inspecting the road nor that the train crew knew or had cause to know or expect that decedent would be on the curve. Instead of there being a blind curve, decedent, had he looked could have seen the train on any part of that curve, and for a distance of 4,000 feet below the point where he was struck. Under the circumstances here presented we think the court could not say, and the jury should not have been permitted to say, that the risk involved was not one which was ordinarily incident to decedent's employment. There was no duty owing decedent by the engineer or fireman, on account of unusual circumstances, hence there was no liability on that ground. In the absence of proof that decedent

was exposed to some unusual danger, it cannot be held that the engineer and fireman were in duty bound to give him warning. They had a right to believe that he would keep out of the way of the train."

It will be noted that in the foregoing case all warning signals were given. This case turns on the application of the doctrine of assumption of risk and there was no such rule involved as in the instant case. The rule No. 1218 there involved was construed by the court as not being promulgated for the safety and protection of decedent apparently in view of the fact that it governed the duties of the fireman and his assistance to the engineer in keeping a lookout for signals and obstructions and such obstructions which the fireman was to keep a lookout for did not include the section foreman.

In the Central Vt. Ry. case the company rule there providing for the spacing of trains was obviously made for the benefit of the trains and their regulation and it was rightfully held was not made for the benefit of the section foreman.

Referring to Rule 59 appellant quotes:

"It may however be claimed that Sullivan was entitled to the benefit of Rule 59 requiring ample warning by whistle to a person on the track, bridge or trestle. This rule has to do with a person seen or known to be on the track in a position of danger. Sullivan, a section man, was not entitled to the benefit of the rule unless he was seasonably seen or known to be on the track or bridge in such position"

to which we add, quoting from opinion:

> "The rules provided that 'employees, in accepting employment, assume its risks'; and 'are required to exercise care to avoid injury to themselves and others. They must expect trains to run at any time, on any track, in either direction, and when a train is approaching must stand clear of all running tracks.' Here the whistle was blown and Sullivan made aware of the approaching train as soon as he was seen or known to be in a position of danger, and the plaintiff was not entitled to go to the jury on this ground."

The evidence in the case clearly shows that other rules as above quoted were involved that had to do with the conduct of Sullivan, and in addition thereto the whistle was blown and Sullivan made aware of the approach of the train as soon as he was seen and known to be in a position of danger. The facts in our case here are different as Rule 30 provided for ringing the bell when the engine was about to move and was made for the benefit of the switch crew including decedent. It is so held in the Gildner, Pacheco, Montgomery, Atchison, T. & S. F. Ry. Co., and Lehigh Valley R. Co. cases, supra, and in addition thereto we cite:

Wyatt vs. N. Y. O. & W. R. Co., 45 Fed. (2d) 705. Certiorari denied, 283 U.S. 829, 75 L. Ed. 1442. Wyatt, a brakeman, working with train crew in making up interstate train, was injured while gathering coal for stove in warming dugout. The Court held, quoting from opinion:

"It is another question whether the defendant owed plaintiff any duty in regard to warning him of the approach of the engine. At the moment he was not doing anything in his employment, but something which concerned his own comfort and that of his fellow employees. However, the practice of gathering fallen coal for the dugout fire was of long duration—certainly long enough to charge the defendant with notice of it. The conductor told Wyatt to get coal for the fire. There was implied, if not express, permission given him to go upon the tracks for this purpose. We hold that employees who are rightfully upon the tracks are entitled to the benefit of this rule, even though not at the moment engaged in work for the company. Hence, defendant owed plaintiff the same duty of care as though he were directly engaged in moving its cars; and a failure to sound the cautionary signal required by the rule was a violation of that duty. It is urged that he voluntarily placed himself in a position of danger with full knowledge that the engine would shortly back down upon track 5, and therefore, was obliged to rely upon his own watchfulness to keep out of its way. Aerkfetz v. Humphreys, 145 U.S. 418, 12 S. Ct. 835, 36 L. Ed. 758; Chesapeake & Ohio Ry. v. Nixon, 271 U.S. 218, 46 S. Ct. 495, 70 L. Ed. 914; Toledo, St. L. & W. R. R. Co. v. Allen, 276 U.S. 165, 48 S. Ct. 215, 72 L. Ed. 513. But this court is committed to the doctrine that those decisions are inapplicable when the railroad violates its own rule requiring the ringing of the engine bell when the engine is about to move. Pacheco v. N. Y., N. H. & H. R. R. Co., 15 F. (2d) 467 (C.C.A. 2)."

It will be noted in the last case cited, as well as the other cases referred to, that the rule with reference to ringing the bell was held to be for the benefit of the members of the switching crew. Decedent while

he was the engine foreman, worked under the supervision and direction of the yardmaster and also the superintendent, had no control whatsoever over the mechanical operation of the engine. That was left entirely to the engineer and fireman and they were bound by the provisions of the rule, as testified to by yardmaster P. D. Pidcock (R. 199-200).

There is no evidence that decedent gave any signal whatsoever for the movement of the engine and cars in this switching operation. The only remote testimony on this point is that Koefod, a switchman, testified the decedent said "let these go to 13" and from that he understood that the cars should be kicked (R. 71-72).

Obviously there is no escape from the fact that the provisions of Rule 30 was made for decedent's benefit and he had a right to rely upon the enginemen complying with its provisions and expect the bell to ring before the engine moved.

Plaintiff contends that without exception every case cited by the petitioner is distinguished on the vital point that the injured employee was not in charge of nor taking part in the switching operation. We do not understand this to be a fact and in contradiction thereof cite the case of Giltner vs. Baltimore & Ohio, *supra*. It was the crew of the injured conductor that were doing the switching when he was injured.

CONCLUSION

Petitioner submits that the case was properly submitted to the jury on the issue of negligence as well as the question of assumption of risk if applicable at all, and that the Circuit Court of Appeals erred in its decision and the same should be reversed and the judgment of the trial court affirmed, or in the alternative a new trial be granted.

Respectfully submitted,

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